A

CLARIANT MASTERBATCHES (M) SDN BHD v. PRESTIGE DYNAMICS INDUSTRIES SDN BHD

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP CJ (MALAYA)
RAMLY ALI FCJ
B AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(F)-70-06-2017(P)]
10 APRIL 2019

C

CONTRACT: *Breach – Condition – Claim for damages arising from breach of condition – Seller supplied masterbatches to buyer – Condition stipulated that masterbatches shall not contain hazardous substance – Buyer placed series of orders before demanding for test report from seller – Discovery that masterbatches bought*
D *from seller and incorporated by buyer into third party's plastic products contained hazardous substance – Buyer paid compensation to third party and claimed for amount paid from seller in damages – Whether buyer waived any alleged breach of contract by supplier after making payment – Whether buyer able to recover damages for any further and/or consequential loss arising out of buyer's own liability to third*
E *party*

SALE OF GOODS: *Damages – Claim for – Claim for damages arising from breach of condition – Seller supplied masterbatches to buyer – Condition stipulated that masterbatches shall not contain hazardous substance – Buyer placed series of orders before demanding for test report from seller – Discovery that masterbatches bought*
F *from seller and incorporated by buyer into third party's plastic products contained hazardous substance – Buyer paid compensation to third party and claimed for amount paid from seller in damages – Whether buyer waived any alleged breach of contract by supplier after making payment – Whether buyer able to recover damages for any further and/or consequential loss arising out of buyer's own liability to third*
G *party – Whether liability naturally arises in usual course of seller selling goods – Whether claim for damages ought to be allowed*

The appellant, Clariant Masterbatches (M) Sdn Bhd ('Clariant'), produced and supplied colour concentrates or colourants, which were known as 'masterbatches'. The respondent, Prestige Dynamics Industries Sdn Bhd
H ('Prestige'), was a moulder who incorporated masterbatches into its plastic products as requested by its customers. In 2003, Clariant gave to Prestige samples and presentation cards or laboratory references containing technical information such as, *inter alia*, the presence of heavy metal pigments ('HMP'). From the samples, Prestige chose 'PAJ4A741GM Red' ('the
I product') which contained HMP, a hazardous substance that produced a

specific shade of red in the plastic products to be moulded. After placing its first order, Prestige continued to place 14 more orders between 2004 and 2007, with the description 'PAJ4A741GM Red', and Clariant delivered the same. In 2007, Prestige ordered the product again and, for the first time, stated in a note in the PO ('the subject PO'), requesting for Clariant to attach the test report and hazardous substance with every delivery. In the same note, Prestige added that no hazardous substance was allowed in the products and packagings. Clariant delivered the product specified in the subject PO to Prestige and upon receiving it, Prestige stamped the words 'Receipt does not constitute acceptance. To be subjected to incoming inspection approval' in the delivery notes. Prestige claimed to have used the product supplied under the subject PO in its business by incorporating it into the plastic parts which it made for Robert Bosch Power Tools Sdn Bhd ('RBPT'). The Swedish Chemical Agency inspected a tool sold by Robert Bosch AB ('RBAB') and found that a plastic part component of the tool contained a chemical which was in breach of the European Union Directive. The said plastic part component of the tool was supplied to RBAB by RBPT and the same part was supplied by Prestige and incorporated the colourant 'PAJ4A741GM Red' which was supplied by Clariant. RBPT claimed for damages against Prestige for breach of contract and the latter paid RM3,196,841.71 ('the compensation sum') to the former. Prestige commenced an action at the High Court against Clariant for damages as a result of the latter's breach of condition, as expressed in the note in the subject PO, seeking RM3,196,841.71. Dismissing Prestige's claim, the High Court Judge ('HCJ') held that (i) as of 2003, Prestige knew the product contained HMP; (ii) between November 2007 and March 2008, Prestige accepted delivery of the product on four separate occasions; (iii) Prestige was accorded reasonable opportunity to inspect and examine the product but never insisted on the test report; and (iv) between February and June 2008, Prestige did not reject the product but instead accepted and paid for them on four different occasions. Prestige appealed against the said decision to the Court of Appeal and the appeal was allowed. The Court of Appeal allowed the claim for damages, in the amount of RM3,196,841.71, on the grounds that the existence of hazardous substance in the product could only be confirmed by a test report and in the absence of such test report, it could not be said that Prestige waived the condition that there be no hazardous substance in the product. Hence, the present appeal. The question of law which arose for determination was whether a buyer of goods, having made payment and having waived any alleged breach of contract by the seller, is able to recover damages for any further and/or consequential loss arising out of the buyer's own liability to a third party, which loss did not naturally arise in the usual course of the seller selling the goods.

A B C D E F G H I

Held (dismissing appeal with costs)
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) The subject PO was obviously an order for the product, which must not contain any hazardous substance. The contract for the sale and purchase of the product was clearly a contract of the sale of goods within the meaning of sub-s. 4(1) of the Sale of Goods Act 1957 ('SOGA') as it was a contract where the seller, Clariant, agreed to transfer the property in the goods, the product, to the buyer, Prestige, for a price. (paras 59 & 60)

(2) Sale pursuant to the subject PO is a sale by description within the meaning of s. 15 of the SOGA. Even if the goods in question had been specified, there could still be a sale by description. In this case, the thing being purchased was 'PAJ4A741GM RED' which was further described as a product which must not contain any hazardous substance. There was the implied condition that the goods, or the product, to be supplied under the subject PO must comply with that description. (paras 61-63)

(3) Clariant accepted the subject PO with the condition that the colourant, specified as PAJ4A741GM RED, must not contain any hazardous substance. If the colourant PAJ4A741GM RED must, of necessity, contain the hazardous substance in order to produce the desired colour, Clariant should not have accepted the order under the subject PO. Having accepted the subject PO, Prestige was entitled to assume that the colourant PAJ4A741GM RED could be produced without any hazardous substance. The contention that Prestige had accepted 14 previous deliveries of PAJ4A741GM RED under previous POs was misconceived as the previous POs did not contain the condition that the product ordered must be free of any hazardous substance. There was no doubt that what was delivered by Clariant did not meet the condition that the product must be free of any hazardous substance. There was a clear breach of that condition of the subject PO. (paras 65-68)

(4) Clariant delivered the product in four separate deliveries on 14 November 2007, 5 January 2008, 1 February 2008 and 1 March 2008. No test report was attached to any of the deliveries. The deliveries were accepted by Prestige subject to the qualification stamped on the delivery notes that the deliveries were still to be subjected to inspection approval. There was a gap of 52 days between the first and second deliveries. There was more than sufficient time for Prestige to examine/inspect the product delivered or, at the very least, to insist on the test report for that delivery. Not only did Prestige not do so, it in fact paid for that first delivery. There was a gap of between three weeks and one month between subsequent deliveries; certainly more than sufficient time for examination/inspection of the product delivered. Again,

Prestige did not ask for the test report. It accepted the deliveries and paid for them. The last payment being on 10 June 2008. Not only did Prestige not reject the product supplied by Clariant, Prestige claimed to have used the product in its own product and supplied the latter to a third party. There was no question that property in the product had passed to Prestige. (paras 69-75)

(5) Section 13 of the SOGA makes provision for situations where the buyer had accepted the goods. Prestige accepted the products, incorporated it into the plastic parts it manufactured and sold those parts to RBPT. The breach of the condition was to be treated as a breach of warranty. Section 59 of the SOGA allows a buyer to sue for damages for breach of warranty. Prestige was 'compelled', by s. 13 of the SOGA, to treat the breach by Clariant as a breach of warranty and was therefore entitled to sue Clariant for damages. (paras 77-80)

(6) Clariant knew that the product would be used in parts to be produced by Prestige and those parts would be supplied to third parties to be incorporated in products produced by the third parties. Clariant was surely aware that if a breach of the condition of its contract with Prestige causes a loss to the latter, it would also, in the usual course of things, naturally cause a loss to the third parties. In this case, the third party concerned was RBPT. The payment that Prestige had to make to RBPT to compensate RBPT for those measures that RBPT had to take had been amply proved. There was more than sufficient oral and documentary evidence to prove that the compensation was paid to compensate RBPT in relation to the plastic parts supplied by Prestige using the product supplied under the subject PO. Prestige had proved the amount it claimed as the compensation sum it had to pay and had paid to RBPT due to Clariant's breach of the subject PO. (paras 92-95)

***Bahasa Malaysia** Headnotes*

Perayu, Clariant Masterbatches (M) Sdn Bhd ('Clariant'), mengeluar dan membekal konsentrat warna atau pewarna, yang dikenali sebagai 'masterbatch'. Responden, Prestige Dynamics Industries Sdn Bhd ('Prestige'), ialah pembuat acuan yang menggunakan masterbatch ini dalam produk plastik yang diminta oleh pelanggannya. Pada 2003, Clariant memberi kepada Prestige contoh-contoh dan kad-kad penyampaian atau rujukan-rujukan makmal yang mengandungi maklumat teknikal seperti, antara lain, kehadiran pigmen logam berat ('HMP'). Berdasarkan contoh-contoh ini, Prestige memilih 'PAJ4A741GM Red' ('produk') yang mengandungi HMP, bahan berbahaya yang menghasilkan satu warna merah yang khusus dalam produk plastik yang hendak diacukan. Selepas membuat

A pesanan pertama, Prestige berterusan membuat 14 lagi pesanan antara 2004 dan 2007, dengan butiran 'PAJ4A741GM Red', dan Clariant menghantar kesemuanya. Pada 2007, Prestige sekali lagi memesan produk tersebut dan, buat pertama kali, menyatakan dalam nota PB ('PB yang dipertikaikan'), meminta Clariant melampirkan bersama-sama laporan ujian dan bahan
B berbahaya dalam setiap penghantaran. Dalam nota yang sama, Prestige menambah bahawa bahan berbahaya tidak dibenarkan dalam produk dan pembungkusan. Clariant menghantar produk yang dinyatakan dalam PB yang dipertikaikan dan setelah menerimanya, Prestige mengecapkan nota-nota penyerahan dengan perkataan-perkataan 'Receipt does not constitute
C acceptance. To be subjected to incoming inspection approval'. Prestige menyatakan telah menggunakan produk yang dibekalkan bawah PB yang dipertikaikan dalam perniagaannya dengan menggabungkan produk dalam bahagian-bahagian plastik yang dibuat untuk Robert Bosch Power Tools Sdn Bhd ('RBPT'). Swedish Chemical Agency memeriksa alat yang dijual oleh Robert Bosch AB ('RBAB') dan mendapati satu bahagian komponen plastik
D alat tersebut mengandungi bahan kimia yang melanggar Arahan Kesatuan Eropah. Bahagian komponen plastik alat ini dibekal kepada RBAB oleh RBPT dan bahagian sama dibekal oleh Prestige dan menggabungkan pewarna 'PAJ4A741GM Red' yang dibekalkan oleh Prestige. RBPT menuntut ganti rugi terhadap Prestige atas pelanggaran kontrak dan Prestige membayar
E RM3,196,841.71 ('jumlah pampasan') kepada RBPT. Prestige memulakan satu tindakan di Mahkamah Tinggi terhadap Clariant untuk ganti rugi susulan pelanggaran syarat oleh Clariant, seperti yang tercatat dalam nota PB yang dipertikaikan, menuntut RM3,196,841.71. Menolak tuntutan Prestige, Hakim Mahkamah Tinggi memutuskan (i) pada 2003, Prestige tahu produk
F tersebut tersebut mengandungi HMP; (ii) antara November 2007 dan Mac 2008, Prestige menerima penghantaran produk pada empat masa berbeza; (iii) Prestige diberi peluang munasabah memeriksa dan meneliti produk tersebut tetapi tidak pernah meminta laporan ujian; dan (iv) antara Februari dan Jun 2008, Prestige tidak pernah menolak produk tersebut tetapi,
G sebaliknya, menerima dan membayar kesemuanya pada empat masa berbeza. Prestige merayu terhadap keputusan tersebut di Mahkamah Rayuan dan rayuan ini dibenarkan. Mahkamah Rayuan membenarkan rayuan terhadap tuntutan ganti rugi, berjumlah RM3,196,841, atas alasan kewujudan bahan berbahaya dalam produk tersebut hanya boleh disahkan oleh laporan ujian dan tanpa laporan ujian tersebut, tidak boleh dikatakan bahawa Prestige
H mengetepikan syarat bahawa tiada bahan berbahaya dalam produk tersebut. Maka timbul rayuan ini. Soalan undang-undang yang timbul untuk diputuskan adalah sama ada pembeli barang, selepas membuat bayaran dan mengetepikan apa-apa dakwaan pelanggaran kontrak oleh pembeli, boleh memperoleh semula ganti rugi untuk apa-apa kerugian lanjut dan/atau

I

sampingan yang timbul susulan liabiliti pembeli sendiri terhadap pihak ketiga iaitu kerugian ini tidak timbul secara semula jadi dalam penjalanan biasa pembeli yang menjual barangan.

Diputuskan (menolak rayuan dengan kos)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

(1) Jelas bahawa PB yang dipertikaikan ialah pesanan untuk produk, yang tidak boleh mengandungi apa-apa bahan berbahaya. Kontrak jual beli produk jelas satu kontrak jualan barangan dalam maksud sub-s. 4(1) Akta Jualan Barangan 1957 ('AJB') kerana ini adalah kontrak yang penjual, iaitu Clariant, bersetuju memindah milik milikan dalam barangan, iaitu produk, kepada pembeli, iaitu Prestige, untuk satu harga.

(2) Jualan, menurut PB yang dipertikaikan, ialah jualan melalui butiran dalam maksud s. 15 AJB. Jika pun barangan yang menjadi persoalan telah dinyatakan, masih boleh berlaku jualan melalui butiran. Dalam kes ini, barang yang dibeli ialah 'PAJ4A741GM RED' yang selanjutnya digambarkan sebagai produk yang mesti tidak mengandungi apa-apa bahan berbahaya. Terdapat syarat tersirat bahawa barangan, atau produk tersebut, yang hendak dibekalkan bawah PB yang dipertikaikan, mesti mematuhi butiran tersebut.

(3) Clariant menerima PB yang dipertikaikan dengan syarat pewarna, yang dinyatakan sebagai PAJ4A741GM RED, mesti tidak mengandungi apa-apa bahan berbahaya. Jika pewarna PAJ4A741GM RED mesti, atas keperluan, mengandungi bahan berbahaya untuk mengeluarkan warna yang diingini, Clariant tidak sepatutnya menerima pesanan bawah PB yang dipertikaikan. Setelah menerima PB yang dipertikaikan, Prestige berhak menganggap pewarna PAJ4A741GM RED boleh dihasilkan tanpa apa-apa bahan berbahaya. Hujahan bahawa Prestige telah menerima 14 hantaran PAJ4A741GM RED bawah PB terdahulu satu salah tanggapan kerana PB terdahulu tidak mengandungi syarat bahawa produk yang dipesan mesti bebas apa-apa bahan berbahaya. Tiada keraguan bahawa yang dihantar oleh Clariant tidak memenuhi syarat produk tersebut mesti bebas apa-apa bahan berbahaya. Jelas terdapat pelanggaran syarat ini dalam PB yang dipertikaikan.

(4) Clariant menghantar produk tersebut dalam empat penghantaran berasingan iaitu pada 14 November 2007, 5 Januari 2008, 1 Februari 2008 dan 1 Mac 2008. Tiada laporan ujian yang dilampirkan pada mana-mana penghantaran. Semua penghantaran ini diterima oleh Prestige, tertakluk pada pengecapan kelayakan pada nota-nota serahan bahawa semua penghantaran tertakluk pada kelulusan selepas pemeriksaan. Terdapat jarak selama 52 hari antara penghantaran pertama dan kedua.

Terdapat lebih daripada cukup masa untuk Prestige memeriksa/meneliti produk yang dihantar atau, paling tidak, untuk meminta laporan ujian penghantaran. Prestige bukan sahaja tidak berbuat demikian bahkan membayar untuk penghantaran pertama. Terdapat jarak selama tiga minggu hingga satu bulan antara penghantaran seterusnya; sudah tentu lebih daripada cukup masa untuk pemeriksaan/penelitian produk yang dihantar. Sekali lagi, Prestige tidak meminta laporan ujian. Prestige menerima semua hantaran dan membayar semuanya. Bayaran terakhir dibuat pada 10 Jun 2008. Prestige bukan sahaja tidak menolak produk yang dibekalkan oleh Clariant bahkan menyatakan telah menggunakan produk ini dalam produknya sendiri dan membekalkannya kepada pihak ketiga. Tiada persoalan bahawa milikan dalam produk ini sudah berpindah kepada Prestige.

(5) Seksyen 13 AJB memperuntukkan situasi-situasi apabila pembeli telah menerima barangan. Prestige telah menerima barangan, menggabungkannya dalam bahagian plastik yang dihasilkan dan menjual bahagian-bahagian tersebut kepada RBPT. Pelanggaran syarat ini seharusnya dianggap sebagai pelanggaran waranti. Seksyen 59 AJB membenarkan pembeli mengambil tindakan untuk ganti rugi susulan pelanggaran waranti. Prestige 'dipaksa' oleh s. 13 AJB untuk menganggap pelanggaran oleh Clariant sebagai waranti dan, dengan itu, berhak mengambil tindakan terhadap Clariant untuk ganti rugi.

(6) Clariant tahu produk tersebut akan digunakan dalam bahagian-bahagian yang akan dihasilkan oleh Prestige dan bahagian-bahagian tersebut akan dibekalkan kepada pihak-pihak ketiga untuk digabungkan dalam produk-produk yang dihasilkan oleh pihak-pihak ketiga ini. Clariant pasti sedar bahawa jika pelanggaran syarat kontraknya dengan Prestige menyebabkan kerugian pada Prestige, ini juga akan, dalam perjalanan biasa, secara semula jadinya, akan menyebabkan kerugian pada pihak-pihak ketiga. Dalam kes ini, pihak ketiga berkenaan ialah RBPT. Bayaran yang Prestige perlu bayar kepada RBPT untuk memampas langkah-langkah yang RBPT perlu ambil telah lebih daripada cukup dibuktikan. Terdapat lebih daripada cukup keterangan lisan dan dokumentar untuk membuktikan pampasan dibayar untuk memampas RBPT berkaitan bahagian-bahagian plastik yang dibekalkan kepada Prestige menggunakan produk yang dibekalkan bawah PB yang dipertikaikan. Prestige berjaya membuktikan jumlah yang dituntut sebagai jumlah pampasan yang perlu dibayarnya dan telah bayar kepada RBPT akibat pelanggaran PB yang dipertikaikan oleh Clariant.

Case(s) referred to:
Grant v. Australia Knitting Mills Ltd [1936] AC 85 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Sale of Goods Act 1957, ss. 3, 4(1), 13, 15, 59

Sale of Goods Act 1893 [UK], s. 53(2)

For the appellant - Ng Sai Yeang & Teoh Chye Yi; M/s Raja Darryl & Loh
For the respondent - Cyrus Das, Karin Lim Ai Ching & Suppiah Arumugam; M/s Pregrave & Matthews

[Editor's note: For the Court of Appeal judgment, please see Prestige Dynamics Industries Sdn Bhd v. Clariant Masterbatches (M) Sdn Bhd [2017] 1 LNS 67 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] This is an appeal by Clariant Masterbatches (M) Sdn Bhd, ("Clariant") who was the defendant in the High Court, against the decision of the Court of Appeal which allowed the appeal by Prestige Dynamics Industries Sdn Bhd, ("Prestige") who was the plaintiff in the High Court, against the decision of the High Court dismissing with costs the plaintiff's claim.

Background Facts

[2] Clariant produces and supplies masterbatches. These are colour concentrates or colourants made from specific ratios of additives which, when mixed, will produce a specific colour.

[3] Sometime in 2003, Clariant gave samples to Prestige.

[4] Clariant also gave to Prestige presentation cards or laboratory references containing technical information such as heat stability, light fastness, food contact suitability and presence of heavy metal pigments (HMP).

[5] Prestige is a moulder who incorporates the masterbatches into its plastic products in accordance with the colour which its customers want.

[6] From the samples, Prestige chose the product "PAJ4A741GM RED" ("product"). The product contains HMP which is a hazardous substance and produces a specific shade of red in the plastic products to be moulded.

[7] On 3 November 2004, Prestige placed its first order for the product.

[8] Between 2004 and 2007, Prestige placed 14 orders for the product.

[9] At all times, in all 14 of the purchase orders Prestige stated the description "PAJ4A741GM RED".

[10] In all instances, Clariant delivered the product with the exact specifications of "PAJ4A741GM RED" as contained in the samples and the laboratory references, which contained HMP.

[11] On 7 August 2007, Prestige again ordered the product, and for the first time stated in a note ("note") in the purchase order ("subject PO") the following:

> Please attach COA and Test Report for Hazardous Substance with every delivery
>
> Please take note no hazardous substance allowed in all product and packaging supplier to PDI *(sic)*

[12] The subject PO also contained the following words:

> The undersigned hereby acknowledge and accept this order in terms accordance to the conditions stipulated above.

[13] Clariant's Customer Service accepted the order in the subject PO on 17 August 2007.

[14] Clariant delivered the product specified in the subject PO to Prestige in four separate consignments on 14 November 2007, 5 January 2008, 1 February 2008 and 1 March 2008 and sent them with the delivery orders and invoices.

[15] Upon receiving the product, Prestige stamped on the delivery notes the following statement:

> Receipt Does Not Constitute Acceptance
>
> To Be Subjected To Incoming Inspection Approval

[16] Prestige claimed to have used the product supplied under the subject PO in its business by incorporating it into the plastic parts which it made for Robert Bosch Power Tools Sdn Bhd ("RBSB").

[17] Prestige paid Clariant a total sum of RM3,980 in four payments, on 29 February 2008, 10 April 2008, 10 May 2008 and 10 June 2008.

[18] On 15 October 2007, the Swedish Chemical Agency inspected a tool sold by Robert Bosch AB ("RBAB") and found that a plastic part component of the tool contained a chemical which was in breach of the European Union "EU Directive 2002/95/EC" ("EU Directive") which had been in force since 2006.

[19] The plastic part component of the tool which contained the chemical in breach of the EU Directive was supplied to RBAB by RBSB. That plastic part was supplied by Prestige and incorporated the colourant "PAJ4A741GM RED which had been supplied by Clariant to Prestige.

[20] RBSB took action to halt usage of the part containing the colourant PAJ4A741GM RED which had been supplied to it by Prestige, and took action to rework items which had already been manufactured and having the plastic parts containing the colourant.

[21] RBSB then claimed damages against Prestige for breach of the latter's contract with RBSB.

[22] Prestige negotiated with RBSB and paid RBSB a sum of RM3,196,841.71 ("compensation sum").

[23] Prestige then claimed against Clariant for damages as a result of Clariant's breach of the condition as expressed in the note in the subject PO.

[24] Prestige filed this action against Clariant, seeking damages of RM3,196,841.71, interests and costs.

At The High Court

[25] At the High Court, Clariant contended that like the 14 previous purchase orders, the Subject PO was for the product "PAJ4A741GM RED" (with contained HMP). Clariant delivered the product under the Subject PO in exact conformity with the samples provided and identical with the 14 previous purchase orders. Clariant had provided only the certificate of analysis and not a test report.

[26] Clariant contended that even if the cause of Prestige's breach to RBSB under its contract with RBSB was due to the HMP in the product which was incorporated into plastic parts for RBSB, Clariant did not breach the contract in the subject PO.

[27] Clariant further contended that it was also not liable for Prestige's alleged loss in the form of the compensation sum which Prestige paid to RBSB, which sum had nothing to do with Clariant.

[28] According to Clariant, the fact that the product contained HMP was within the respondent's knowledge. It supplied the product before and after the EU Directive came into force and also under the subject PO in exact conformity with the samples provided and description attributed to the product. Prestige accepted the product and made full payment without any objection.

[29] Clariant said that it was not a party to Prestige's contract with RBSB and was not even aware of the terms of the contract. Neither Prestige nor RBSB had disclosed the terms to Clariant. Thus, it was not bound by RBSB's specific requirement for compliance with the EU Directive even if it was provided for in that contract. It merely supplied the product and had no knowledge of the product being incorporated into any specific part or that the part would be sold in Europe. In 2003, Clariant only knew that Prestige used the product for 'Bosch' without any further details.

[30] It was only in March 2008, after Clariant had delivered the last consignment of the product that Prestige asked Clariant to give information on the product relating to HMP and later suggested that Clariant had breached the subject PO.

[31] Despite the request for information on the product relating to HMP, Prestige made three payments to Clariant: in April, May and June 2008.

[32] Clariant's position was that while it agreed that the product contained HMP, its contractual obligations were fulfilled when the product was delivered and accepted by Prestige. There was no basis for any claim to be made against Clariant.

[33] At the conclusion of the full hearing, the High Court dismissed Prestige's claim with costs.

[34] The High Court held that as of 2003, Prestige knew the product contained HMP. Between November 2007 and March 2008, Prestige accepted delivery of the product on four separate occasions. Prestige was accorded reasonable opportunity to inspect and examine the product. Prestige never asked for nor insisted on the test report. Between February 2008 and June 2008, Prestige did not reject the product but instead accepted them and paid for them on four different occasions.

[35] Prestige appealed against the decision to the Court of Appeal.

At The Court Of Appeal

[36] The Court of Appeal, after hearing the parties, allowed Prestiges' appeal and set aside the judgment of the High Court.

[37] The Court of Appeal held that the existence of any hazardous substance in the product could only be confirmed by a test report. In the absence of such test report, it could not be said that Prestige had waived the condition that there be no hazardous substances in the product. The Court of Appeal allowed the sum of RM3,196,841.71 claimed by Prestige as damages, being the compensation sum paid to RBSB.

At The Federal Court

Leave Question

[38] Clariant applied to this court for leave to appeal against the decision of the Court of Appeal. On 1 June 2017, leave was granted.

[39] The question of law (which we will refer to as leave question after this) for which leave was granted is:

> Whether a buyer of goods having made payment and having waived any alleged breach of contract by the seller, is able to recover damages for any further and/or consequential loss arising out of the buyer's own liability to a third party, which loss did not naturally arise in the usual course of the seller selling the goods.

Submissions

Submissions By Clariant

[40] Clariant submitted that Prestiges' main witness, PW1, agreed that as with all 14 previous purchase orders, by specifying the description of the product, the expectation was to get the same colourant which would correspond with the sample and specifications stated in the laboratory references. PW1 also agreed that the colourant attributed to the product was of paramount importance in Prestige's manufacturing process to produce the exact shade of red that RBSB requested.

[41] Clariant submitted that at all times Prestige knew the product they wanted for their client and placed reliance on the description stated in the samples and laboratory references and this was still the case when Prestige placed its order under the subject PO.

[42] Prestige used the description 'PAJ4A741GM RED' in identifying the product it wanted to be supplied to it and Clariant supplied the product matching the description 'PAJ4A741GM RED'.

[43] The statement in the note that no hazardous substance was allowed would mean different chemical elements needed to be added or removed and would result in a masterbatch having a shade of red that is not the same as 'PAJ4A741GM RED'.

[44] Prestige retained the product for months and never intimated any rejection to Clariant and never insisted on being provided with a test report before accepting the product and making payment.

[45] By its conduct, Prestige, according to Clariant, had waived the requirement for a test report. In fact, the non-supply of a test report like in all previous 14 purchase orders did not affect the orders made as the product was duly supplied in accordance with the sample and description. The respondent also went on to pay the appellant in full without objection.

[46] Prestige had a reasonable opportunity to examine the product but had retained and used the product. Prestige must be deemed to have accepted the product that they bought.

[47] Prestige's claim was in relation to its breach of the RB Contract to RBSB. However, there was never any incorporation of the RB Contract into the PO.

[48] The Restrictions of Hazardous Substances compliance was a term imposed by RBSB on Prestige under their contract and was never a term of the subject PO between Prestige and Clariant.

[49] Clariant was not responsible for any breach of the contract between RBSB and Prestige. The subject PO was not related to that contract. Clariant duly repudiated liability.

[50] Even if it was liable, Clariant's position was that it was only liable to Prestige for the sum of RM3,980 which was the loss that naturally arose in the usual course of things from the breach of the subject PO.

Submissions By Prestige

[51] Prestige contended that the sole contractual document relevant to this case was the subject PO. Each purchase order between the parties constituted a separate and distinct contract. So, the terms or conditions stipulated in any previous purchase orders issued by Prestige to Clariant were not relevant.

[52] Prestige issued the subject PO by which it specifically ordered from Clariant a product which did not contain any hazardous substance. This was further emphasised by the fact that Prestige wanted a test report with each delivery.

[53] Clariant accepted the subject PO unconditionally and without any amendments. It was therefore under a contractual obligation to comply with the conditions stipulated in the subject PO, failing which it would be liable to Prestige.

[54] Prestige contended that Clariant failed to comply with the term that the product must not contain any hazardous substance.

[55] Under such circumstances, said Prestige, its receipt and usage of the product and payment for the product cannot amount to acceptance of the product or waiver of its contractual rights.

[56] Prestige asserted that Clariant knew Prestige was supplying the product to RBSB. Under such circumstances, Clariant need not be a party or privy to the contract between Prestige and RBSB; it was liable for all consequential losses suffered by Prestige as a result of its breach of contract.

[57] Prestige claimed that it had proven that it was Clariant's breach which had resulted in Prestige paying the compensation sum to RBSB and Prestige was entitled to be paid that same amount by Clariant.

Our Analysis

[58] The following facts are not disputed:

(a) a valid contract of sale was entered into by Prestige and Clariant under the subject PO;

(b) the subject PO was for the supply of that product described as "PAJ4A741GM RED";

(c) the subject PO dated 7 August 2007 bears the note on hazardous substances;

(d) Clariant accepted the order in the subject PO in terms of the conditions stipulated by Prestige in the subject PO, which would include the condition in the note;

(e) four deliveries were made pursuant to the subject PO, the first delivery being on 14 November 2007, and the last on 1 March 2008;

(f) Prestige received all four deliveries and stamped on the delivery notes that receipt of the deliveries did not constitute acceptance, and the deliveries were still to be subjected to inspection approval;

(g) no test report as stipulated in the subject PO was attached to any of the 4 deliveries;

(h) Prestige did not return any of the goods delivered pursuant to the subject PO;

(i) Prestige did not at any time demand submission of the test results from Clariant.

Sale Of Goods Act 1957

Applicability

[59] The subject PO is obviously an order for the product (the colourant identified as PAJ4A741GM RED) which must not contain any hazardous substances.

[60] The contract for the sale (and purchase) of the product is clearly a contract of the sale of goods within the meaning of sub-s. 4(1) of the Sale of Goods Act 1957 ("Act 382") as it is a contract whereby the seller (Clariant) agrees to transfer the property in the goods (the product) to the buyer (Prestige) for a price.

Sale By Description

[61] In our view, that sale pursuant to the subject PO is a sale by description within the meaning of s. 15 of Act 382, which reads as follows:

> Sale by description
>
> 15. Where there is a contract for the sale of goods by description there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

[62] Even if the goods in question had been specified, there can still be a sale by description. In *Grant v. Australia Knitting Mills Ltd* [1936] AC 85, the Privy Council took the view that "there is a sale by description even though the buyer is buying something displayed before him on the counter; a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description, eg, woollen under-garments, a hot water bottle, a secondhand reaping machine, to select a few obvious illustrations".

[63] In this case, the thing being purchased was the colourant identified as PAJ4A741GM RED, and which was further described as a product which must not contain any hazardous substance. There was therefore the implied condition that the goods (the product) to be supplied under the subject PO must comply with that description.

Was There A Breach Of The Implied Condition?

[64] In this case, the product being sold and purchased was the specific product which both the seller (Clariant) and the buyer (Prestige) knew as PAJ4A741GM RED, which must also, in addition, not contain any hazardous substance.

[65] As mentioned earlier, Clariant accepted the Subject PO with the stipulated condition that the colourant specified as PAJ4A741GM RED must not contain any hazardous substance.

[66] lf, as argued by Clariant, the colourant PAJ4A741GM RED must of necessity contain the hazardous substance in order to produce the desired colour, it stands to reason that Clariant should not have accepted the order under the subject PO. Having accepted the subject PO, Prestige is entitled to assume that the colourant PAJ4A741GM RED could be produced without any hazardous substance.

[67] The contention that Prestige had accepted 14 previous deliveries of PAJ4A741GM RED under previous purchase orders is misconceived as the previous purchase orders did not contain the condition that the product ordered must be free of any hazardous substance.

[68] There is no doubt that what was delivered by Clariant did not meet the condition that the product must be free of any hazardous substance. There was therefore a clear breach of that condition of the subject PO.

Waiver

[69] As stated earlier, Clariant delivered the product in four separate deliveries: on 14 November 2007, 5 January 2008, 1 February 2008 and 1 March 2008. No test report was attached to any of the deliveries. The deliveries were accepted by Prestige subject to the qualification stamped on the delivery notes that the deliveries were still to be subjected to inspection approval.

[70] There was a gap of 52 days between the first delivery and the second delivery. There was more than sufficient time for Prestige to examine/inspect the product delivered, or at the very least to insist on the test report for that delivery. Not only did Prestige not do so, it in fact paid for that first delivery. It did so on 29 February 2008.

[71] There was a gap of between three weeks and one month between subsequent deliveries. Certainly there was more than sufficient time for an examination/inspection of the product delivered. Again, Prestige did not ask for the test report. It accepted the deliveries and paid for them. The last payment being on 10 June 2008.

[72] It must be remembered that the subject PO came with two conditions: that a test report be attached to every delivery, and that the product and packaging supplied must not contain any hazardous substance.

[73] As we understand it, the importance of the test report lies in the fact that it would disclose the true nature of the product supplied in each delivery of the product ordered under the subject PO and thus should have been able to indicate the presence or absence of hazardous material in the particular shipment of the product.

[74] Not only did Prestige not reject the product supplied by Clariant, Prestige claimed to have used the product in its own product and supplied the latter to a third party.

[75] There is no question that property in the goods (product) had passed to Prestige.

[76] In those circumstances, does Prestige have any remedy as against Clariant?

Remedy

[77] Section 13 of Act 382 makes provision for situations where the buyer had accepted the goods. That section reads as follows:

> **When condition to be treated as warranty**
>
> 13(1) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.
>
> (2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract express or implied to that effect.
>
> (3) Nothing in this section shall affect the case of any condition or warranty the fulfilment of which is excused by law by reason of impossibility or otherwise.

[78] In this case, Prestige accepted the products, incorporated it into the plastic parts it manufactured and sold those parts to RSB. In our considered view, the breach of the condition is to be treated as a breach of warranty.

[79] Section 59 of Act 382 allows a buyer to sue for damages for breach of warranty. It provides as follows:

> **Remedy for breach of warranty**
>
> 59(1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may:
>
> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) sue the seller for damages for breach of warranty.
>
> (2) The fact that a buyer has set up a breach of warranty in diminution of the price does not prevent him suing for the same breach of warranty if he has suffered further damage.

[80] In this case, Prestige is 'compelled' by s. 13 to treat the breach by Clariant as a breach of warranty and therefore is entitled to sue Clariant for damages.

Damages

[81] Prestige claimed the sum of RM3,196,841.71, being the compensation sum it claimed to have paid under its settlement with RBSB due to product supplied by Clariant under the subject PO being found to contain hazardous substances, and for damages to be assessed.

[82] The Court of Appeal allowed the claim for RM3,196,841.71. The basis for that amount being granted appear in the paragraphs quoted below:

> **Proof of damages**
>
> [29] On perusal of the evidence adduced, we are of the opinion that the plaintiff had adduced sufficient documentary and oral evidence to prove its damages. Reference is made to Exhibit P11, which shows the breakdown of the total sum of damages claimed by the plaintiff in the sum of RM3,196, 841.71.
>
> [30] The documents pertaining to rework costs appear as Exhibit 43 (p. 759-766 R/R Jilid 5). Invoices relating to freight charges appear as Exhibits P44 and P45 (p. 770-851 and 852-888). Legal fees incurred in European countries is shown in p. 767 R/R Jilid 5.
>
> [31] The Plaintiff's witnesses, PW2, PW4 and PW6 had verified the claims from Robert Bosch and the amount claimed by the plaintiff from the defendant.

[83] Neither s. 59 of Act 382 nor any other provision of that Act has the equivalent of sub-s. 53(2) of the English Sale of Goods Act 1893 after which it is modelled. That subsection provides that "The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty". In the circumstances, the applicable statutory provision is s. 74 of the Contracts Act 1950, which continues to apply to contracts for sale of goods by virtue of s. 3 of Act 382 "in so far as they are not inconsistent with the express provisions of this Act".

[84] The relevant provisions of s. 74 of the Contracts Act 1950 are as follows:

> 74(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[85] In the context of the case before us, there was nothing to negate the evidence that the sum of RM3,196,841.71 was paid by Prestige under its settlement with RBSB.

[86] The pertinent question to be asked is whether that sum paid to RBSB is a loss to Prestige that "naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach"? Or was the payment/loss "a remote and indirect loss"?

[87] The pleaded case of Prestige is that the breach by Clariant is in respect of the subject PO which imposed a condition that the product to be supplied must not contain hazardous substances.

[88] As mentioned above, Prestige's case was that on 15 October 2007, the Swedish Chemical Agency inspected a part in a tool sold by RBSB and found that the tool contained plastic parts containing a chemical which was in breach of the EU Directive. That tool was supplied by RBSB and the plastic parts were supplied by Prestige with the colourant supplied by Clariant as one of its components.

[89] It must be noted that the first "instalment" of the masterbatch/colourant ordered under the subject PO was only delivered on 14 November 2007. This was 29 days BEFORE the inspection by the Swedish Chemical Agency. The tools inspected by the Swedish Authorities could not possibly therefore have contained the product supplied by Clariant under the subject PO.

[90] However, our examination of the oral and documentary evidence in the record of appeal shows that the report of the Swedish Chemical Agency triggered the inspection, quarantine, return and reworking of the products containing the colourant supplied by Clariant under the subject PO.

[91] That the sole cause for the remedial and preventive measures that RBSB had to take was the colourant supplied by Clariant was not in dispute. We note that Clariant's position was not that it did not supply the product containing the hazardous substance, but that Prestige (and RBSB) knew all along that the product contained the substance, and that it did not have knowledge that the product would be used in goods to be sold in the European Union countries.

[92] We are satisfied that Clariant knew that the product would be used in parts to be produced by Prestige and those parts would be supplied to third parties to be incorporated in products produced by the third parties. Clariant was surely aware that if a breach of the condition of its contract with Prestige causes a loss to Prestige it would also in the usual course of things naturally cause a loss to the third parties. In this case, the third party concerned was RBSB.

[93] We are satisfied that the payment that Prestige had to make to RBSB to compensate RBSB for those measures that RBSB had to take had been amply proved, in particular, through the evidence of PW4 and PW6, who were the employees of RBSB with knowledge of the payments. Their evidence was largely unchallenged.

[94] There was more than sufficient oral and documentary evidence to prove that the compensation was paid to compensate RBSB in relation to the plastic parts supplied by Prestige using the product supplied under the Subject PO.

[95] In the circumstances, we found no basis to disagree with the Court of Appeal that Prestige had proved the amount it claimed as the compensation sum it had to pay and had paid to RBSB due to Clariant's breach of the subject PO.

Leave Question

[96] We are of the considered view that in the circumstances of this case, which involves essentially issues of facts, the leave question need not be answered.

Decision

[97] This appeal is dismissed with costs.

[98] Finally, we wish to state that this judgement is delivered pursuant to s. 78 of the Courts of Judicature Act 1964 as our brother, Jeffrey Tan, has retired.